INTERNATIONAL DECISIONS

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Sovereign immunity—sources of international law—acts jure imperii*—violations of human rights and humanitarian law—*jus cogens

JURISDICTIONAL IMMUNITIES OF THE STATE (Germany v. Italy; Greece Intervening). *At* http://www.icj-cij.org.
International Court of Justice, February 3, 2012.

In this judgment, the International Court of Justice decided that, by allowing civil claims against Germany for wartime atrocities to proceed before Italian courts, the Italian Republic had violated its obligation to respect Germany's sovereign immunity.[1]

The case arose out of events during the German occupation of Italy during World War II. From 1943 onward, after the fall of Mussolini, German forces took as prisoners several hundred thousand members of the Italian armed forces. They were denied prisoner-of-war (POW) status and deported to Germany to be used as forced labor. Under Article 77(4) of the 1947 Peace Treaty, "Italy waive[d] on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945."[2] However, the 1953 German Federal Compensation Law Concerning Victims of National Socialist Persecution[3] provided for some avenues of compensation but left large numbers of Italian victims unsatisfied. Treaties concluded between Italy and Germany in 1961 sought to close the matter, with Germany undertaking to pay Italy forty million marks. A German federal law adopted in 2000 provided some additional means of compensation but was interpreted by German authorities as not extending to POWs, which status the German authorities now maintained the Italian internees had never lost (para. 26). As a result, many remained uncompensated.

In 1998 Luigi Ferrini, an Italian national who had been arrested, deported, and forced to work in a German munitions factory, instituted proceedings against Germany before Italian courts. Germany's claims of sovereign immunity were rejected by the Italian Court of Cassation, which ruled that sovereign immunity did not apply where the acts in question constituted an international crime.[4] More claims and litigation followed. In 2007, in proceedings brought

[1] Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening) (Int'l Ct. Justice Feb. 3, 2012), *at* http://www.icj-cij.org [hereinafter Judgment].

[2] Treaty of Peace, Allies et al.-It., Art. 77(4), Feb. 10, 1947, 61 Stat. 1245, 49 & 50 UNTS.

[3] Bundesentschädigungsgesetz (BEG), 1953 BGBL. I 1387, *amended by* Second Amending Law to the Federal Supplementary Law for the Compensation of Victims of National Socialist Persecution, 1955 BGBL. I 506, and Third Law to Amend the Federal Supplementary Law for the Compensation of Victims of National Socialist Persecution, 1956 BGBL. I 559.

[4] Ferrini v. Fed. Rep. Germany, Cass., sez. plen., 11 marzo 2004, n.5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 539 (2004), 128 ILR 658.

against Max Josef Milde, a member of the "Hermann Göring" division charged with participating in massacres committed in Italy, the Court of Cassation reaffirmed the approach it had taken in *Ferrini*.[5]

On December 23, 2008, Germany instituted proceedings against Italy before the International Court of Justice, claiming that the Italian courts had failed to respect the jurisdictional immunity enjoyed by Germany under international law, and that Italy had further violated Germany's immunity by allowing enforcement proceedings against German property and the execution in Italy of Greek judgments relating to the German forces' Distomo massacre in 1944. Germany invoked the European Convention for the Peaceful Settlement of Disputes as the basis for the Court's jurisdiction. Italy raised no objection, and the Court affirmed it had jurisdiction (paras. 27–51).[6]

Proceeding to the merits, the Court noted that "both Parties agree that immunity is governed by international law and is not a mere matter of comity" (para. 53). Because there was no treaty on the matter that would bind them both, the Court said, any entitlement to immunity could be derived only from customary law. Customary law was based on "settled practice," pursuant to the Court's 1969 judgment in the *North Sea Continental Shelf* cases.[7] The relevant state practice was to be found mainly in the judgments of national courts and national legislation (para. 55). Furthermore,

> the rule of State immunity . . . . derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it. (Para. 57)

In terms of the substance of the immunity claims, the Court first addressed whether torts committed by states attract immunity. It noted, but did not discuss, Italy's reference to state practice that has asserted jurisdiction over torts caused by foreign armed forces (para. 62). The Court likewise devoted little analysis to the scope of acts covered by state immunity, since Italy had conceded, significantly, that the German wartime acts in question were *acta jure imperii*, notwithstanding their illegality. The Court initially accepted that state immunity does not cover death and personal injury committed within the forum state's territory (para. 64). Yet it observed that national statutes providing for this exception drew no distinction between acts *jure imperii* and other acts.

The Court also concluded that neither the 1972 European Convention on State Immunity[8] nor the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property

[5] Criminal Proceedings Against Milde, Cass., sez. 1 pen., 13 gennaio 2009, n.1072, 92 RDI 618 (2009), *available at* INT'L L. DOMESTIC CTS. 1224 (IT 2009).

[6] European Convention for the Peaceful Settlement of Disputes, Art. 1, Apr. 29, 1957, ETS No. 23, 320 UNTS 243. Earlier, the Court had dismissed the Italian counterclaim that Germany had violated the duty to pay reparations to the relevant victims, for lack of jurisdiction. Jurisdictional Immunities of the State (Ger. v. It.), Counterclaim (Int'l Ct. Justice July 6, 2010).

[7] North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 44, para. 77 (Feb. 20).

[8] European Convention on State Immunity, May 16, 1972, ETS No. 74, 1495 UNTS 182.

(UN Immunities Convention)[9] precludes immunity for acts committed by armed forces. Article 31 of the European Convention specifically excludes the acts of armed forces on the territory of another contracting state. While the UN Immunities Convention contains no express exclusion, it was adopted on the basis of a general understanding that military activities were not covered. No state questioned this interpretation and two (Norway and Sweden) expressed a similar understanding upon ratifying that Convention (paras. 64–69).[10]

Regarding state practice, the Court noted that out of ten national statutes it consulted, nine deny immunity for territorial torts, while only two exclude acts committed by armed forces. Decisions of eight national jurisdictions have held acts performed by armed forces and warships to be immune. While those decisions did not concern the issues in the instant case, which the Court conceded, it said they confirmed the immunity of armed forces for acts *jure imperii*. "[T]he most pertinent State practice is to be found in those national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict" (para. 73). Citing decisions from France, Slovenia, Serbia, Poland, Belgium, and Brazil, the Court determined that

> State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. (Para. 77)[11]

The Court then addressed whether human rights violations disentitle states from claiming immunity. If such an exception depended on the state's having committed a serious violation of international human rights law, national courts would have to inquire into the merits to determine whether jurisdiction existed (para. 82). Referring to case law of six national jurisdictions (and to the uncertainty of Italy's own position as presented to it), the Court found that no such exception to sovereign immunity exists. As for the "state-sponsored terrorism" exception to the U.S. Foreign Sovereign Immunities Act and the U.S. *Letelier* case, holding that an action for personal injury and death (resulting from an act of terrorism in the United States) could be maintained under the noncommercial-tort exception to immunity,[12] the Court described these provisions as unprecedented and not replicated in the legislation of other states.

Turning to Italy's claim that the German acts in question violated *jus cogens* and were thus not entitled to immunity, the Court disagreed, finding no conflict between *jus cogens* and rules of state immunity. The two sets of rules, it said, apply to different matters. Rules of immunity are "procedural in character," addressed only to jurisdiction and not whether the conduct in question was lawful or unlawful. Therefore, they do not contravene substantive rules of *jus*

[9] United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex (Dec. 2, 2004).

[10] *See* MTDSG [Multilateral Treaties Deposited with the Secretary-General], *at* http://treaties.un.org.

[11] *See also* Judgment, paras. 70–77. However, on that point, Judge Gaja reached the opposite conclusion, observing, pursuant to the International Law Commission's position, that this is a "grey area" in which legislation and judicial practice vary. Dissenting Opinion of Judge *ad hoc* Gaja, paras. 9–10 (quoting Report of the International Law Commission on the Work of Its Forty-third Session, [1991] 2 Y.B. Int'l L. Comm'n 23, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), UN Sales No. E.93.V.9 (Part 2) (commentary to draft Art. 5 on jurisdictional immunities of states, para. 2)).

[12] 28 U.S.C. §§1605(a)(5)(A), 1605A (2011); Letelier v. Republic of Chile, 488 F.Supp. 665, 671–73 (D.D.C. 1980), 63 ILR 378, 386–88.

cogens, nor can the concept of *jus cogens* displace their application (paras. 93–95). In support of the proposition that *jus cogens* rules have no jurisdictional effect, the Court referred to its previous decisions in *Arrest Warrant*, where it had recognized the personal immunity of an incumbent foreign minister, and *Democratic Republic of the Congo v. Rwanda*, where it had declined to exercise jurisdiction.[13] Further, the Court said, it did not matter that no alternative remedies were available to victims. It could find "no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress" (para. 101).

Finally, the Court held that the measures taken by Italy regarding German property in Italy constituted a violation of Germany's immunities, as did the enforcement of Greek judgments in Italy. As for remedies, the Court ruled that the effects of the Italian decisions must be reversed through means of Italy's choosing (para. 137).

* * * *

The judgment was clearly aimed at endorsing and consolidating the "classic" or "mainline" view of state immunity. Proceeding from the consensual positivist framework that underlies proper international legal reasoning, the Court should first have undertaken to establish whether, following the abolition of the doctrine of absolute sovereign immunity and the emergence of the restrictive theory, a rule of international law has in fact emerged that would preclude the Italian courts from permitting war crimes litigation against Germany. The next question would be whether any relevant exceptions to that rule exist. Instead, the Court's approach seems based on natural law dogma, to the effect that the rules of sovereign immunity are useful, reasonable, and necessary—hence part of international law.

In light of the Italian concession that immunity is governed by customary international law, it is puzzling that Article 2(1) of the UN Charter was used as an additional justification, resulting in the dialectic assertion that immunities are both an expression of, and a deviation from, territorial jurisdiction. Inferring the existence of one substantive rule of international law from another substantive rule contradicts positivist legal reasoning.

Moreover, in its assessment of customary international law the Court did not examine all relevant national practice and opinion. Even though the absolute immunity rule has largely been abandoned, one may legitimately question whether a sufficient international consensus has emerged to support a newer "restrictive immunity" rule. Much of the practice cited by the Court was based on national legislation that excludes consideration of international law, which thus diminishes its potential to contribute to state practice. Moreover, several national courts have denied the customary law status of immunities, as have various leading doctrinal authorities.[14] Had it really followed a consensual positivist approach, the Court would have been

[13] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3 (Feb. 14) [hereinafter Arrest Warrant]; Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006 ICJ REP. 6 (Feb. 3).

[14] I Congreso del Partido, [1983] 1 A.C. 244, 260–61 (H.L.) (Wilberforce, L.J.); Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B., 529, 552–53 (C.A.), 16 ILM 471, 478 (1977); McElhinney v. Williams, [1995] 3 I.R. 382, 402 (Ir.), 104 ILR 691, 701; Lafontant v. Aristide, 844 F.Supp. 128, 131–33 (E.D.N.Y. 1994), 103 ILR 581, 584–86 (stating at p. 586 that "the grant of immunity is a privilege which the United States may withhold from any claimant"); United States v. Noriega, 746 F.Supp. 1506, 1520–21 (S.D. Fla. 1990), 99 ILR 143, 162–63; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 81

compelled to conclude that no consistent practice supporting a restrictive approach has emerged.

Moreover, although the "general immunity versus specific exceptions" approach is reflected in national legislation, it does not bring about a sound explanation of the international legal position on this matter. From a functional perspective, exceptions need not be sought because the entire rationale of restrictive immunity is to require identifying the (non)sovereign nature of each and every act on its own merit. Whether an act is *jure imperii* is not the same thing as whether it is lawful, but that, quite simply, does not determine anything. The focus must instead be on the meaning of the exercise of sovereign power, which precedes the question whether jurisdiction can be exercised over the act concerned. The essence of the restrictive doctrine is that the "preliminary" or "procedural" nature of state immunity depends on the substantive characterization of the act in question as sovereign or nonsovereign. Thus, the Court suggests that the human rights restriction on immunities would require a national court "to hold an enquiry into the merits in order to determine whether it had jurisdiction" (para. 82). But inquiring into the nature of the activities at issue would not necessarily amount to inquiring into the merits of the case, that is, deciding whether those acts violated the applicable law and determining their consequences.

The Court's conceptual starting point was "whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*)" (para. 60). But its subsequent reasoning does not follow this direction. The Court should have asked whether the acts in question inhere in public authority and can be taken only by the state (as opposed to nonstate entities and individuals). An act cannot be regarded as an exercise of sovereign power if it can be done by those who lack such power. But states can and do act in a "private capacity" in various contexts, including commercial transactions, even when they employ state machinery and resources. In this light, there is no feasible way to distinguish commercial acts and torts from international crimes, because they can all be perpetrated by states—whether or not in exercising or invoking public authority—and by private entities. This conclusion is further corroborated by multiple findings of national civil and criminal courts, essentially bypassed in the Court's judgment, that acts amounting to serious human rights violations and international crimes are not sovereign acts.[15]

The fact-specific focus on these issues raises the additional question of which law the Court thought should govern the valid exercise of sovereign powers in this case—the law of the Third Reich or public international law? If the former, then the Court has essentially found that law, as interpreted and applied by the Reich's officials, to legitimate the commission of war crimes

(1994); D. P. O'CONNELL, INTERNATIONAL LAW 846 (2d ed. 1970); 1 L. OPPENHEIM, INTERNATIONAL LAW 274 (H. Lauterpacht ed., 8th ed. 1955); Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 9, 36, 53 (1994 III).

[15] Holland v. Lampen-Wolfe, [2000] UKHL 40, [2000] 3 All E.R. 833, 845; Commissioner of Police, *ex parte* Pinochet, [1999] UKHL 17, [1999] 2 All E.R. 97, 113–14, 165–66, 179; R. v. Bartle, *ex parte* Pinochet, [1998] UKHL 41, [1998] 4 All E.R. 897, 939–40, 945–46; I Congreso del Partido, [1983] 1 A.C. at 268; Hilao v. Marcos, 25 F.3d 1467, 1469–72 (9th Cir. 1994), 104 ILR 119, 122–25 (stating at p. 124 that these violations were "as adjudicable and redressable as would be a dictator's act of rape") (quoting Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988)); *see also* Arrest Warrant, 2002 ICJ REP. at 85, 88–89, paras. 74, 85 (sep. op. Higgins, Kooijmans, & Buergenthal, JJ).

and to be internationally opposable to that effect—a result that is both legally flawed and morally abhorrent. While admitting that the acts in question violated international law, the Court nonetheless accepted them as an exercise of German sovereign power. But if international law governs, an act cannot be a crime and at the same time a valid exercise of sovereign power. This is essentially a question of substantive qualification of acts. The distinction between sovereign and nonsovereign acts cannot be affected by the "procedural" nature of immunities. Before one gets to whether this procedural bar applies, one must identify the substantive nature of the act that brings this bar into effect.

In general, the Court's treatment of state practice is inconsistent. Although the need to identify "settled practice" is properly noted, to qualify as customary rules embodying the general agreement of states, such practice must be consistent, general, uniform, and durable. The small number of domestic decisions referred to by the Court, focusing on various separate aspects of sovereign immunity, is insufficient to represent a consistent and uniform practice demonstrating the general agreement of states through the expression of their legal conviction to that effect (*opinio juris*). As for the domestic case law specifically on war crimes, it is unclear how that practice could be said to bind Italy when during the same time period Italian courts had consistently denied immunity for similar acts. The Court's method is even more controversial in according probative value to German court decisions (para. 75) that it denied to those of Italian courts, with the implication that the applicant's practice carries more weight than the respondent's.

Even within the limited body of evidence it relied on, the Court ranked the state practice that lends support to its conclusions over other elements of state practice that contradict its approach. When confronted with the reality that most of the relevant national statutes deny immunity for territorial torts, either generally or in conjunction with the acts committed by armed forces, the Court simply pleaded unawareness whether those provisions had been applied by national courts and then recast tort immunity into armed forces immunity to rely on the practice of the few states seen as supportive of its priorities. Moreover, some cases were treated in a rather counterfactual manner. For example, the English decisions in *Littrell* and *Lampen-Wolfe* did not relate to international crimes; the Irish Supreme Court's decision in *McElhinney* concerned a soldier assigned to guard the border, not to go out and commit crimes.[16] The real task this practice suggests is to identify whether the act in question is sovereign in the first place, not that anything done by armed forces constitutes a sovereign act in itself.

The Court's treatment of the human rights "exception" draws an artificial distinction between the substantive nature of the claim and the extent of a court's jurisdictional competence. If the restrictive doctrine is properly applied, the nature of the claim (in this case human rights violations) actually determines whether immunities extend to the relevant case and whether jurisdiction over it can be exercised. The strict separation between substance and procedure can work only if immunities are absolute, so that the mere fact of their invocation can stop proceedings on account of the identity of the respondent, without any inquiry into the nature of the act in question.

[16] *See* Holland v. Lampen-Wolfe, [2000] 3 All E.R. at 845–46; *McElhinney*, [1995] 3 I.R. 382, 104 ILR 691; Littrell v. United States of America (No. 2), [1995] 1 W.L.R. 82 (C.A.).

Moreover, various aspects of U.S. immunities law, including the state-sponsored terrorism provisions of the Foreign Sovereign Immunities Act, have attracted academic criticism[17] and can only be described as incompatible with the Court's own approach to the scope of state immunity; but no evidence that they breached U.S. obligations under international law was cited, nor was any state practice such as protests alluded to. One has to assume that the Court chose to ignore those facts as inconsistent with its goal.

Regarding *jus cogens*, the proposition that the unlawfulness of acts attributed to the state does not deprive the state of its immunity is simplistic at best. It is implausible to say (para. 93) that *jus cogens* rules and rules on immunity address different matters, one substantive and one procedural. In all areas where it applies, the concept of *jus cogens* deals not with the substantive legality of acts but with their legal consequences, including validity, opposability, and nonrecognition—that is, with what happens after the breach. More generally, *jus cogens* is a superior law that voids derogatory transactions between states, whether effected through a written agreement or through practice.[18] The Court also ignores the Naples resolution of the Institut de droit international, which clearly recognizes the conflict between international crimes and jurisdictional immunities and affirms that consequently immunities are not available in civil proceedings.[19] Granting immunity to foreign states in situations involving *jus cogens* violations, especially when no other remedy is forthcoming, prevents *jus cogens* norms from operating as rules, from taking effect in relation to underlying facts, and from determining legal consequences including remedies. The relevant *jus cogens* rules are thus completely excluded from the legal picture. If that is not derogation, what is?

According to the Court, granting immunity to a state does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, as provided in Article 41 of the articles on state responsibility of the International Law Commission (ILC) (para. 93).[20] However, Article 41 does not deal with the substantive legality of breaches of *jus cogens*, but their legal effect and consequences. The "situation created by the breach" in question involves impunity and a lack of remedies. The Court's whole approach recognizes precisely that situation as lawful and purports to perpetuate it.

The assertion that national courts have not considered the availability of alternative remedies is also open to question. The practice cited by the Court involved judicial decisions of seven states (para. 96): one (Canada) was constrained by the letter of national legislation; one (France) actually admitted that, in principle, *jus cogens* can prevail over immunities; and one (Poland) adopted the alternative remedies approach. As for the UN Immunities Convention,

[17] For an overview, see Ronald Bettauer, *Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity—Legal Underpinnings and Implications for U.S. Law*, ASIL INSIGHTS (Nov. 19, 2009). The adoption on March 13, 2012, after the Court's judgment was delivered, of the amendments to the Canadian State Immunity Act (R.S.C. 1985, c. S-18) to enable the victims of terrorism to sue the relevant foreign states further reinforces this point.

[18] *See* Vienna Convention on the Law of Treaties, Art. 53, *opened for signature* May 23, 1969, 1155 UNTS 331.

[19] Institut de droit international, Naples Session, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes pmbl. (2009), *at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf.

[20] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session 43, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001).

its failure to consider the effect of human rights and *jus cogens* explains why some states have made interpretative declarations excluding human rights and humanitarian law from the Convention's scope, as a sign that they were not consenting to its denial of remedies to victims. This approach was reiterated in the ILC's working group report, which, again, was not addressed in the Court's reasoning.[21]

As for the relevance of its own prior decisions, the Court essentially read into them conditions and qualifications that did not quite underlie them when they were adopted. For example, the *Arrest Warrant* judgment did not expressly concern *jus cogens*. Instead, it was premised on a rationale directly contradicting the approach the Court adopted in the case at hand, namely, the need to avoid impunity and make sure that alternative remedies remained available. As for *Democratic Republic of the Congo v. Rwanda*, it did not concern immunities before national courts but *jus cogens* pleaded as an ancillary question on the Court's own jurisdiction, which would not obtain unless established by *jus cogens* as such. That situation differed qualitatively from the preexisting entitlement of national courts to jurisdiction on a basis other than one that confers or denies immunities.

All these reasons suggest that the principal aspects of the Court's reasoning and conclusions are fundamentally flawed. By not engaging in a proper analysis of the sources of law, the Court failed to demonstrate the plausibility of its major findings and thus the consistency of its approach with the state of positive international law. The result is legally deficient if not morally suspect. The Court's decisions do not create precedent, and the continuing value of this judgment is compromised in any event by Italy's repeated admissions in Germany's favor (on customary law and acts *jure imperii*), which in part led the Court to avoid examining the accuracy of the legal positions in question. The Court's failure properly to apply the sources of law prescribed under Article 38 of its Statute leaves the bindingness of the judgment on Italy open to doubt. Whether Italian authorities comply is for them to choose, but whether they are obligated to do so is questionable.

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European Court of Justice—fundamental rights—prohibition of inhuman or degrading treatment—Common European Asylum System—concept of "safe countries"—transfer of asylum seekers to the responsible member state

N.S. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT. Joined Cases C-411/10 & C-493/10. *At* http://curia.europa.eu.
Court of Justice of the European Union (Grand Chamber), December 21, 2011.

In its judgment in joined cases *N.S. v. Secretary of State* and *M.E. v. Refugee Applications Commissioner*,[1] the Grand Chamber of the Court of Justice of the European Union (ECJ)[2] held that member states of the European Union (EU or Union), including their national courts,

[21] *See* Memorandum by the Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, para. 46, UN Doc. A/CN.4/596, at 31–32 (Mar. 31, 2008).

[1] Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't (Eur. Ct. Justice Dec. 21, 2011). Decisions of the Court and opinions of the advocates general are available online at http://curia.europa.eu.

[2] Under the CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION Art. 19(1), 2010 O.J. (C 83) 13 [hereinafter TEU], the institution of the EU Court of Justice encompasses the Court of Justice, the General